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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TYLER JENKINS, Defendant and Appellant.	B226654 (Los Angeles County Super. Ct. No. TA106871)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jerry E. Johnson, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Tyler Jenkins appeals from the judgment entered following his conviction by jury on one count of voluntary manslaughter and one count of negligent shooting at a motor vehicle. (Pen. Code, §§ 192, subd. (a), 246.3.)[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

On April 16, 2009, around 2:00 p.m., appellant and two friends, minors L.H. and Steve M., were near the intersection of Acacia Avenue and Poplar Street in the City of Compton. They had been visiting a friend named Quisha and were going to L.'s house a few blocks away. L. was riding a bicycle, and the other two were walking.

The boys were in an area claimed by a Hispanic gang, known as the Compton Varrio Tortilla Flats or T-Flats, and a rival gang that was primarily African-American, the Treetop Pirus. The three boys knew the T-Flats gang did not "really like Black people," so they went up Acacia Avenue instead of Oleander Avenue. According to Steve, appellant was a member of the Treetop Pirus, but L. testified that appellant was not in a gang. Steve considered himself an associate of the gang, but not a member. L. also considered himself an associate of the Treetop Pirus, but not a member.

The three boys were paying attention to their surroundings in order to avoid trouble. When the three reached the intersection of Elm Street and Acacia Avenue, L. noticed a car that gave him "a bad feeling." He told Steve, "Hey, come over here," and he slowed down to make sure Steve crossed the street.

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[1] Further statutory references are to the Penal Code unless otherwise specified.

The car was black and looked to L. like a Honda. Eder Sosa-Vicencio was driving the car, Eric Naranjo was in the front passenger seat, and two other men were in the back. Sosa-Vicencio was a "hardcore" member of the T-Flats, known as Hammer, and he was about 24 years old at the time of the shooting. Naranjo previously had admitted being a member of the T-Flats, but he denied it at trial. Sosa-Vicencio and Naranjo had threatened L. with a gun on several prior occasions.

L. saw someone in the car put his hand out the window on the left side of the car and make the letter "F" with his fingers, which was the sign for the T-Flats gang, and he heard someone in the car yell, "Flats." After the person made the gang sign, L. saw someone move in the car as if he were reaching for a weapon. L. knew the occupants of the car were T-Flats because he had been threatened and chased by them numerous times.

L. became worried, so he told Steve, "When I say run, just run, don't look back, just keep going and then make a left on Cedar." When the boys started running north on Acacia, the car made a screeching sound and sped down the street after them. L. was about a block ahead of appellant, and he heard appellant yell at him to "keep going."

Steve testified that he saw the car stop about a block away and heard someone in the car yell "T-Flats." The car started moving, so Steve started walking faster, and then he heard one or two gunshots, so he started running. After a pause, he heard about six more gunshots.

L. heard gunshots, and when he turned onto Cedar, he looked back and noticed the shots had stopped. He saw the car still coming toward him, but he noticed that the driver was slouched over on the steering wheel and was bloody. The car hit a van, and the passengers got out of the car and were looking toward L.

L. thought he saw something shiny, like chrome, being held by one of the passengers when he got out of the car. L. was afraid the person would shoot him, so he took off, with Steve on the back of his bicycle, and went to Quisha's house. They did not know where appellant was.

Appellant arrived at Quisha's house a few minutes after L. and Steve and told them he had taken off running because someone started shooting. Steve testified that appellant told them he had hit the back windows of the car. Appellant told L. and Steve the gun he used was near a house on Poplar with a gold truck in front of it, so L. and Steve left to get the gun.

L. denied that appellant told him to retrieve a gun or gave him bullets. He testified that he and Steve started walking to another friend's house, but they were pulled over by the police about two blocks from where the shooting took place. L. had some bullets in his shoe. The police told L. that the bullets matched those that were used in the shooting and that he would be charged with murder because he had the bullets. Steve and L. were placed in a police van and were taken to a sheriff's station, where they were questioned by homicide detectives until about midnight.

The prosecutor played a recording of L.'s interview with Sergeants Robert Gray and Martin Rodriguez, homicide investigators who arrived at the scene several hours after the shooting. L. conceded at trial that his statements during the interview were different from his trial testimony, but he testified that his testimony in the court room was the truth because he only told the officers what they wanted to hear during the interview. He explained that he was nervous during the interview, and that the officers cut him off when he tried to say something other than what they wanted to hear.

Los Angeles County Deputy Sheriff Andrew Meyer testified that he found an empty ammunition box in the front pocket of L.'s sweatshirt. After Deputy Meyer learned that the make and caliber matched the bullets used in the shooting, he asked another deputy to search L. thoroughly, and they found the bullets in L.'s shoe.

L. earlier had found a gun in a couch at Quisha's house, but he denied ever owning a gun or giving a gun to appellant. Steve testified that he previously had seen a gun in a couch at Quisha's house, but not on the day of the shooting.

Naranjo denied that anyone in the car made gang signs or yelled "T-Flats," although he did testify that Sosa-Vicencio stopped the car at Poplar Street. He testified that Sosa-Vicencio stopped the car because he was having car trouble.

Naranjo testified that someone started shooting at them when Sosa-Vicencio stopped the car and put his head out the window. After Sosa-Vicencio was struck in the head, Naranjo tried to steer the car, but the car crashed. Naranjo said that the shots kept coming after Sosa-Vicencio had been hit and that the windows broke in the doors on the driver's side. After the car crashed, Naranjo got out of the car and ran away because he was on house arrest for a probation violation, and he was not supposed to associate with anyone in a gang. Naranjo left the area and went to stay with relatives in Apple Valley until June. He did not speak to law enforcement about the shooting until February 2010, when he was contacted by Sergeant Gray.

Naranjo conceded at trial that, if a Treetop Piru tagged over T-Flats graffiti, a T-Flats gang member would want to kill that gang member. He initially denied seeing any Black males tagging or in the area prior to the shooting, but he later testified that he saw one. Naranjo also denied sticking a gun out the passenger window of the car.

William Griffith was inside a house near the intersection of Acacia Avenue and Poplar Street. He heard two to three gunshots and went to the doorway to see where the shots were coming from. He looked north on Acacia and saw a car slow and come to a stop about a block away. He also saw a young Black male, wearing a black zippered sweatshirt, baggy black pants, and black shoes, running in his direction in the street. Griffith saw the man extend his right hand around his left shoulder and fire about three shots behind him while he was running.

Sheriff deputies later took Griffith around the neighborhood to look for the young man, but they were unable to find him. A few weeks after the incident, Griffith was shown a six-pack photographic lineup and eliminated four of the photos but was unable to identify the shooter.

At the time of the incident, Gregoria Esparza was sitting in her front yard with five friends, outside her house at the corner of Poplar Street and Acacia Avenue. There were three young Black men at the corner, and the tallest of the three was writing on a stop sign pole with a marker.[2] While they were writing, Esparza noticed a black car driving slowly down Acacia Avenue.

A few seconds later, Esparza heard shooting, and everyone "went down." She heard about eight gunshots, and she did not hear any pause between the gunshots. Esparza saw the car crash after passing Elm Street.

Gail Williams was driving her car on Acacia and had turned on Poplar and made a U-turn to park. She saw a car, containing at least two Hispanic young men, drive slowly past her. She noticed the car because it stopped at the intersection of Poplar and Acacia, even though there was no stop sign.

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[2] L. and Steve were 15 years old at the time of the incident and 16 years old at the time of the trial, and appellant was 17 years old at the time of the incident. Steve was described as "fairly tall."

After Williams parked her car on the corner of Acacia and Poplar, she sat in the car with the windows rolled up, looking for her phone. The young men in the car were looking up the street, and then they drove up Acacia. Just before they drove off, the driver put his hand out the window and was "throwing" gang signs. Williams saw "three young kids" cross Acacia.

A few seconds later, Williams heard gunshots coming from the north. She saw a young Black man, wearing a black hoodie, running south on Acacia, shooting behind him over his shoulder. The police later asked Williams to identify the shooter from a six-pack photographic lineup. She testified that none of the three kids she saw on Acacia was the person she chose from the lineup. She did not see anyone write on a stop sign pole.

Deputy Derek Fender was in the first sheriff's unit to arrive at the scene of the shooting. When he arrived, there was no one other than Sosa-Vicencio in the car, although law enforcement later learned that two or three male Hispanics had run from the scene. Deputy Fender did not find any weapon in or around the car.

Deputy Boyd Zumwalt found a gun under a gas meter on the side of a house on Poplar Street with a gold car parked in front of it. Deputy Zumwalt recovered seven nine-millimeter cartridge cases from the scene, all of them the same type. There were three bullet holes in the car, one in the left rear quarter panel and one each in the two doors on the driver's side.

Appellant was arrested in Las Vegas, Nevada, on May 12, 2009.

Defense Evidence

On March 20, 2009, Deputy Stephen Schneider detained Sosa-Vicencio for writing graffiti. Sosa-Vicencio admitted that he had written "CVTF Hammer" in

various places, and he knew that he had been "tagged over" by a Treetop Piru. Sosa-Vicencio also had written "PKCK," meaning Piru Killer and Crip Killer.

Sophia Pereyra was in her house at the corner of Acacia and Poplar at the time of the shooting. She heard someone outside her house say, "It's CVTF, homey," and then she heard the sound of someone running and, a few seconds later, she heard gunshots.

Deputy Albert Carrillo testified that he previously had testified before a grand jury that the T-Flats were known for hating Blacks, using derogatory terms against them, and intimidating them by throwing bricks and brandishing weapons. Deputy Jose Salgado, a gang investigator in Compton, testified that he had seen graffiti by T-Flats saying "PK," for "Piru Killer," or "NK," for "Nigger Killer."

Appellant testified on his own behalf. Appellant's mother lived in Bellflower, and his grandmother lived near Compton. He testified that, prior to the shooting, he had been living in a park in the neighborhood because he was avoiding probation officers who looked for him at his mother's and grandmother's houses. He had been friends with L. and Steve for several years and used to see them at Quisha's house. He described Quisha as his girlfriend.

Appellant had seen Sosa-Vicencio in the neighborhood before the shooting and knew he was a Tortilla Flats gang member. Two or three weeks before the shooting, appellant was walking on Rosecrans when he saw Sosa-Vicencio and several other people in a car. Sosa-Vicencio rolled down his window and said "Flats" and "F niggers" to appellant. No one pointed weapons at him, but appellant became afraid and ran away.

About a week before the shooting, appellant saw Sosa-Vicencio again. As appellant was walking to Quisha's house, he passed a house where Sosa-Vicencio and several other male Hispanics were standing. Sosa-Vicencio asked appellant

where he was from, and appellant said that he "didn't bang," indicating that he was not a gang member. Sosa-Vicencio replied, "So what? This is T-Flats and F niggers, . . . niggers can't be in my hood." Appellant did not reply and kept walking, but another man said, "Let's get this mayate." Counsel asked appellant if he recognized this as a derogatory Hispanic gang term for a Black, but appellant said he did not know what the term meant. Appellant started running, and the men chased him for two or three blocks, saying they were going to get him. Appellant feared for his life. L. and Steve previously had told appellant that the T-Flats were dangerous toward young Blacks.

On the day of the shooting, L. showed appellant the gun that was subsequently used in the shooting. Appellant wanted to buy the gun from L. to protect himself. L. told appellant the gun was already loaded and showed appellant how to use the gun, and appellant put it in his right pocket. Appellant did not see the ammunition box and did not know L. had it.

Appellant testified that, while the boys were walking, Steve stopped and wrote on the stop sign, but appellant did not see what he wrote. The boys continued walking, and L. was riding his bicycle a little in front of the others, when appellant heard L. say something like, "Oh, shit, that's them." Appellant saw the car and heard someone in the car say "T-Flats."

Appellant recognized Sosa-Vicencio and saw him lean out the car window, yell "Flats," and make the Flats sign with his hand. Appellant heard the car rev up and saw it come toward him, and he saw Naranjo put his hand out the window, holding something black that appellant thought was a gun. Appellant took the gun out of his pocket and shot at the car. He thought he did not hit the car and was afraid the people were going to get out of the car, so he started running away, shooting behind him toward the car. Appellant kept running, left the gun by the

side of a house, and ran to Quisha's house, where he found L. and Steve. Appellant told L. where the gun was and left for Las Vegas a few days later.

Rebuttal Evidence

Sergeant Rodriguez testified that when he interviewed appellant in June 2009, appellant did not raise the issue of self-defense until over an hour into the interview.

Procedural Background

Appellant was charged in a four-count amended information: count 1, murder (§ 187, subd. (a)); count 2, shooting at an occupied motor vehicle (§ 246); counts 3 and 4, attempted murder (§§ 664/187, subd. (a)). It was further alleged that appellant personally and intentionally discharged a firearm, causing great bodily injury and death, and that he used a firearm (§ 12022.53, subds. (b), (c), & (d)), that he was a minor at least 16 years of age at the time of the offense (Welf. & Inst. Code, § 707, subd. (d)(1)), and that the offense was committed for the benefit of a gang (§ 186.22, subd. (b)(4)).

The jury found appellant guilty of the lesser offenses of voluntary manslaughter and negligent shooting at a motor vehicle. (§§ 192, subd. (a), 246.3.) The jury found true the allegation that appellant used a firearm as to count 1, but found the gang allegation not true. Appellant was acquitted of the attempted murder counts.

The court sentenced appellant to the upper term of 11 years as to count 1, plus 10 years for the firearm allegation, for a total of 21 years. The court stayed the sentence on count 2 pursuant to section 654. Appellant filed a timely notice of appeal.

DISCUSSION

Appellant raises three claims on appeal. First, he contends that the prosecution failed to present sufficient evidence to disprove his claim of self-defense. Second, appellant contends that the trial court erred in excluding evidence of Sosa-Vicencio's prior possession of firearms. Third, appellant argues that the trial court erred by imposing the upper terms in sentencing him.

I. Self-Defense

Appellant was charged with murder, malicious shooting at an occupied motor vehicle, and attempted willful, deliberate and premeditated murder of two other individuals. The jury was instructed on two theories of voluntary manslaughter. Pursuant to CALCRIM No. 570, the jury was instructed that "[a] killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment."

The jury was also instructed pursuant to CALCRIM No. 571: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense or imperfect defense of another. [¶] . . . [¶] The defendant acted in imperfect self-defense or imperfect defense of another if: [¶] 1. The defendant actually believed that he or someone

else was in imminent danger of being killed or suffering great bodily injury; [¶] AND [¶] 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; [¶] BUT [¶] 3. At least one of those beliefs was unreasonable. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. [¶] In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant. [¶] If you find that Eder Sosa-Vicencio threatened or harmed the defendant or others in the past, you may consider that information in evaluating the defendant's beliefs. [¶] If you find that the defendant received a threat from someone else that he reasonably associated with Eder Sosa-Vicencio, you may consider that threat in evaluating the defendant's beliefs."

Appellant argues that, given the jury's finding that the shooting was negligent, not malicious, the jury must have relied on the second theory of voluntary manslaughter – that he acted in unreasonable self-defense. He recites the evidence presented at trial and argues that the jury was wrong as a matter of law in rejecting his claim of self-defense. We disagree.

"'For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. [Citation.] If the belief subjectively exists but is objectively unreasonable, there is "imperfect self-defense," i.e., "the defendant is deemed to have acted without malice and cannot be convicted of murder," but can be convicted of manslaughter. [Citation.] To constitute "perfect self-defense," i.e., to exonerate the person completely, the belief must also be objectively reasonable. [Citations.] . . . [F]or either perfect or imperfect self-defense, the fear must be of imminent harm. "Fear of future harm – no matter how great the fear and no matter how great the likelihood of the harm – will not suffice. The defendant's fear must be of imminent danger to life or great bodily injury."

[Citation.]' [Citation.] All the surrounding circumstances, including prior assaults and threats, may be considered in determining whether the accused perceived an imminent threat of death or great bodily injury. [Citations.]" (*People v. Battle* (2011) 198 Cal.App.4th 50, 72.) The determination of the reasonableness of the defendant's belief in the need to defend himself is for the jury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1088 (*Humphrey*).)

Where, as here, the defendant asserts self-defense and has sufficiently raised "a reasonable doubt of his guilt of murder," the burden is on the prosecution to establish beyond a reasonable doubt that the defendant did not act in self-defense. (*People v. Rios* (2000) 23 Cal.4th 450, 461-462; see also *People v. Martinez* (2003) 31 Cal.4th 673, 707 (conc. & dis. opn. of Kennard, J.) ["When a factual circumstance negates an element of the crime, as imperfect self-defense negates malice, the federal Constitution's due process guarantee requires the prosecution to bear the burden of proving the absence of that circumstance beyond a reasonable doubt."].) Nonetheless, "'"'"[t]he test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.'"' [Citation.]" (*People v. Wright* (1985) 39 Cal.3d 576, 592.)

"The law we apply in assessing a claim of sufficiency of the evidence is well established: '"'"[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'"'" [Citation.] . . . 'We presume "'in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] This standard applies whether direct or circumstantial evidence is involved."

[Citation.]' [Citation.]" (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 294.) We conclude that the evidence is sufficient to support the jury's verdict and that the jury's finding was not wrong as a matter of law.

Although appellant presented evidence that he had been threatened by Sosa-Vicencio in the past and that Sosa-Vicencio used a gang sign during the incident, the prosecution presented evidence that the only bullets found at the scene were from the gun used by appellant in the shooting, and that this was an unusual gun. Thus, there was no evidence that Sosa-Vicencio or someone else in the car had a gun or shot at appellant before he fired. Even taking into consideration the other evidence appellant raised to support his self-defense claim, such as the prior threats by Sosa-Vicencio, the determination of the reasonableness of appellant's belief in his need to defend himself is for the jury. (*Humphrey*, *supra*, 13 Cal.4th at p. 1088.)

Construing, as we must, the evidence in the light most favorable to the judgment, we conclude the evidence is sufficient to support the jury's finding that appellant's belief in the need to defend himself was not reasonable. Our review of the whole record thus indicates that there is substantial evidence such that a reasonable trier of fact could find appellant guilty beyond a reasonable doubt.

II. Evidence of Victim's Firearm Possession

Defense counsel made an offer of proof that previous searches of Sosa-Vicencio's home revealed that he had firearms, and that Sosa-Vicencio had stated that he got the firearms from gang members. The court excluded the evidence of prior possession of firearms, pursuant to Evidence Code section 1103.

Evidence Code section 1103, subdivision (a) provides that "evidence of the character or a trait of character (in the form of an opinion, evidence of reputation,

or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by [Evidence Code] Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character." "Only relevant evidence is admissible, and the trial court has broad discretion to determine the relevance of evidence. [Citation.]" (*People v. Cash* (2002) 28 Cal.4th 703, 727 (*Cash*).)

Sosa-Vicencio's prior possession of firearms was not relevant unless appellant knew about that possession. (*Cash*, *supra*, 28 Cal.4th at p. 726 [holding that the victim's "customary debt collection practices were not relevant to show defendant's state of mind at the time he killed [the victim] unless defendant knew of those practices"].) There was no evidence that appellant was aware of Sosa-Vicencio's prior firearm possession at the time he shot Sosa-Vicencio. The prior firearm possession accordingly was not relevant to show appellant's state of mind at the time of the shooting. The trial court did not abuse its discretion in excluding this evidence.

III. Sentencing

The trial court imposed the upper term of 11 years on the voluntary manslaughter count and the high term of 10 years for the weapon allegation. The court reasoned, first, that appellant had armed himself and "walk[ed] into the area of an enemy gang where he may necessarily be required to use it." The court also found that the fact that there were "two head shots, not one," indicated a "definite intent to fire at some passenger in the vehicle." The court further stated that appellant showed "incredibly good marksmanship, for somebody who's just spraying bullets," and that appellant fired the weapon three separate times: "The

first shots early on, the second came around the car and fired again, and then third he's running, retreating down the street firing again." The court found that this indicated appellant was not in fear for his safety but instead intended to injure someone "for no real good valid reason that I could see."

The court also imposed the high term of 10 years for the weapon allegation, but did not explain why. The court imposed the high term on count 3, the negligent discharge of a firearm, and stayed execution of the sentence pursuant to section 654.

Appellant contends that the trial court erred in imposing sentence by relying on findings that were not supported by the record and by improperly using some findings more than once. He argues that each of the six factors relied upon by the trial court was improperly considered.

Respondent contends that appellant forfeited a challenge to the trial court's decision to select the upper term by failing to object at sentencing. A defendant can forfeit a claim regarding various sentencing issues, including "cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*People v. Scott* (1994) 9 Cal.4th 331, 353 (*Scott*).) However, "there must be a meaningful opportunity to object . . . . This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices." (*Id.* at p. 356.)

Appellant concedes that trial counsel did not object. He therefore has forfeited his claim, but, in any event, we address the merits of his claim and find no error.[3]

We review a trial court's decision to impose the upper term for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.]" (*Ibid.*) "'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.)

One of the aggravating circumstances the court cited was that appellant was armed. However, the fact that appellant was armed cannot be used to impose the upper term because the court imposed a 10-year term for the firearm enhancement. In imposing sentence, "[t]he court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." (§ 1170, subd. (b) (2009 ed.).) "To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so." (Cal. Rules of Court, rule 4.420(c).) The court did not have discretion to

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[3] Because we address the merits of appellant's claim, we do not address his argument that his trial counsel was ineffective for failing to object.

strike the firearm enhancement, and therefore erred in relying on appellant being armed.

The court also found as an aggravating circumstance that appellant shot Sosa-Vicencio twice in the head; however, the record does not support the finding that there were two shots to the victim's head. According to the medical examiner, Sosa-Vicencio suffered a gunshot wound to the head and one to the left shoulder. The portions of the transcript cited by respondent to support this finding indicate that Naranjo testified that Sosa-Vicencio was hit by the second shot that Naranjo heard, not that Sosa-Vicencio was hit in the head twice.

Nonetheless, "[u]nder California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term. [Citation.]" (*People v. Black* (2007) 41 Cal.4th 799, 813.) The trial court also found that appellant fired the weapon three separate times. Appellant testified that, when the car was speeding toward him, he stepped off the curb and hid behind a parked car. After shooting once, he did not think he had hit Sosa-Vicencio's car, so he feared they would get out of the car to attack him. He therefore ran around the parked car and shot about six more times as he ran away down the street. The record thus indicates that appellant did fire the weapon at least two separate times.

"'When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper.' [Citation.]" (*People v. Calhoun* (2007) 40 Cal.4th 398, 410 (conc. opn. of Kennard, J.).) The trial court here made clear its intention to impose the sentence it imposed, expressing the hope that it had

articulated enough reasons to sustain the sentence. It is thus not reasonably probable that the trial court would have chosen a lesser sentence.

Appellant has failed to meet his burden of showing that the sentencing decision was irrational or arbitrary. We therefore find no abuse of discretion in the trial court's imposition of the upper terms in sentencing.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.